Office-Supreme Court, U.S.
FILED
OCT 28 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

v.

KOHN, INC., THE KOHN BEVERAGE CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH AND PETER ZARICH,

Respondents.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

v.

THE STROH BREWERY COMPANY AND MORTON R. ENGEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS KOHN, INC., THE KOHN BEVERAGE CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH AND PETER ZARICH IN OPPOSITION.

C. KENNETH CLARK,
1200 Mahoning Bank Bldg.,
Youngstown 3, Ohio,
Attorney for Respondents, Kohn, Inc., The Kohn Beverage Co., Pauline Kohn, Adam J. Kohn, Stephen Zarich and Peter Zarich.

(Other Counsel on Inside of Cover.)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

C. KENNETH CLARK, JR. and
HARRINGTON, HUXLEY & SMITH,
1200 Mahoning Bank Bldg.,
Youngstown, Ohio,
Of Counsel for Respondents,
Kohn, Inc., The Kohn Beverage Co.,
Pauline Kohn, Adam J. Kohn,
Stephen Zarich and Peter Zarich.

TABLE OF CONTENTS.

Opinions Below and Jurisdiction 1

Statutes Involved 2

Question Presented 2

Statement of the Case 3

Argument 8

A. The Decision of the Court Below is Not in Conflict With Any Decisions of This Court 8

B. The Decision of the Court Below is Not in Conflict With Decisions of Other Courts of Appeal 14

C. The Commission of a Business Tort in Connection With a Refusal to Deal Does Not Entitle the Injured Party to Treble Damages Under the Sherman Act 16

Conclusion 24

TABLE OF AUTHORITIES.

Cases.

A. C. Becken Co. v. Gemex Corp., 272 F. 2d 1 (7th Cir., 1959), *cert. den.* 363 U. S. 962 (1960) 13

A. S. Rampell v. Hyster, 3 N. Y. 2d 369, 144 N. E. 2d 371 (1957) 8

Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp., 41 F. 2d 148 (1st Cir., 1930), 57 F. 2d 96 (1st Cir., 1932) 14, 15

Apex Hosiery Company v. Leader, 310 U. S. 469 (1940) 10, 20, 21

Atlantic Heel Co. v. Allied Heel Co., 284 F. 2d 879 (1st Cir., 1960) 14

Bausch & Lomb Optical Co. v. Wahlgren, 1 F. Supp. 799 (N. D. Ill., 1932) 8

Binderup v. Pathe Exchange, 263 U. S. 291 (1923) 9

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 273 F. 2d 218 (3rd Cir., 1959), *rev'd* 365 U. S. 127 (1961) 21

Flintkote Company v. Lysfjord, 246 F. 2d 368 (9th Cir., 1957) 12

Hunt v. Crumboch, 325 U. S. 821 (1945) 23

International Tailoring Co. v. Lucas, 64 N. Y. S. 2d 879 (1946) 8

Klor's v. Broadway Hale Stores, 359 U. S. 207 (1959) 10

Loewe v. Lawlor, 208 U. S. 274 (1908) 9

Lorain Journal Co. v. United States, 342 U. S. 14 (1951) 11

Morgan's Home Equipment Corp. v. Martucci, 390 Pa. 618, 136 Atl. 2d 838 (1957) 8

Northern Pacific Ry. Co. v. United States, 356 U. S. 1 (1958) 11

Parmelee Transportation Co. v. Keeshin, 292 F. 2d 794 (7th Cir., 1961), *cert. den.* 368 U. S. 944 (1961), *rehearing den.* 368 U. S. 972 (1962) 22

Poller v. Columbia Broadcasting System, 368 U. S. 464 (1962) 11, 18

Radiant Burners, Inc. v. Peoples' Gas, Light & Coke Co., 364 U. S. 656 (1961) 10

Radovich v. National Football League, 352 U. S. 445 (1957) 11

Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D. Md. 1956), *aff'd. on op. below* 239 F. 2d 176 (4th Cir., 1956), *cert. den.* 355 U. S. 823 (1957) 18

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F. 2d 1 (9th Cir., 1960), *modified* 289 F. 2d 933 (9th Cir., 1961), *rev'd* 370 U. S. 19 (1962) 15

Syracuse Broadcasting Corp. v. Newhouse, 236 F. 2d 522 (2nd Cir., 1956) 15

Times-Picayune Publishing Co. v. United States, 345 U. S. 594 (1953) 12, 18

United States v. Parke, Davis & Co., 362 U. S. 29 (1960) 13

United States v. Socony Vacuum Oil Co., 310 U. S. 150 (1940) 13

United States v. Yellow Cab Co., 332 U. S. 218 (1947) 12

White Motor Company v. United States, 372 U. S. 253 (1963) 12

Article.

Oppenheim, *Selected Antitrust Developments*, 15 A. B. A. Section on Antitrust Law, 37 (1959) 16

Statutes.

Sherman Act:

Sec. 1 (15 U. S. C. § 1) 2, 3, 14, 16

Sec. 2 (15 U. S. C. § 2) 2

Clayton Act:

Sec. 1 (15 U. S. C. § 12) 17

Sec. 4 (15 U. S. C. § 15) 17

Automobile Dealer Franchise Act of 1956 (15 U. S. C. §§ 1221-1225) 17

Federal Trade Commission Act, Section 5 (15 U. S. C. § 45) 17

In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

v.

KOHN, INC., THE KOHN BEVERAGE CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH AND PETER ZARICH,

Respondents.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

v.

THE STROH BREWERY COMPANY AND MORTON R. ENGEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS KOHN, INC., THE KOHN BEVERAGE CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH AND PETER ZARICH IN OPPOSITION.

OPINIONS BELOW AND JURISDICTION.

The opinion of the Court of Appeals is reported at 318 F. 2d 283.

Petitioner, Ace Beer Distributors, Inc. (hereinafter referred to as "Ace"), previously applied for a prelimi-

nary injunction in this action and in a still pending companion action alleging common law torts against certain of the respondents in this action. The Court of Appeals affirmed without opinion denials of preliminary injunctions in both cases at 280 F. 2d 424.

Otherwise, the statement in the petition as to the opinions below and the jurisdictional requirements are correct.

STATUTES INVOLVED.

The statutes involved are those listed on page 3 of the petition. Petitioner has abandoned any claim under Section 2 of the Sherman Act and that section should not have been printed in Appendix B to the petition.

QUESTION PRESENTED.

Whether a complaint alleging a substitution by a brewer (Stroh) of a newly created distributor (Kohn) to replace Stroh's former distributor (Ace) whose sole business was the distribution of Stroh beer pursuant to an exclusive distributorship in two counties in Ohio, states a cause of action under Section 1 of the Sherman Act where there is no allegation that Ace and Kohn were in competition with each other or that there was any effect upon the competitive state of the market, but where it is alleged that common law torts were committed against Ace and that the acts done were as a result of a conspiracy between Stroh and Kohn.

STATEMENT OF THE CASE.

This is a treble damage action brought by petitioner against respondents solely for alleged violations of Section 1 of the Sherman Act, 15 U. S. C. § 1, which makes illegal every conspiracy "in restraint of trade or commerce among the several States."

The District Court for the Northern District of Ohio, Eastern Division, granted judgment on the pleadings to the respondents and this judgment was affirmed by the Court of Appeals for the Sixth Circuit.

There is no diversity of citizenship among the parties and the District Court would have no jurisdiction to hear a common law tort action against certain of the respondents. The question is not whether the petitioner might have a cause of action for tort in some other court against these respondents, but is solely whether the complaint states a claim under Section 1 of the Sherman Act.

In its Statement of the Case and throughout its petition filed in this Court petitioner repeatedly incorrectly asserts that the complaint alleges a conspiracy to destroy "a competitor" or to suppress "competition." In order to do this petitioner even misquotes its own complaint. At page 24 of the petition, petitioner represents to this Court that its complaint specifically alleges a conspiracy "to suppress competition."

The complaint does not contain the conclusory allegation which petitioner purported to quote from it. Instead of reading "to suppress competition," the complaint actually reads "to suppress *prospective* competition" (Complaint, Par. 15; Tr. 8a). The circumstances under which a suppression of existing competition may constitute a Sherman Act violation are quite different from those which must appear when, as here, the complaint alleges only

the suppression of the prospective competition of an individual non-competitor.

Petitioner, upon this misquotation of its complaint, then continues on page 24 of its petition by complaining of the Court of Appeals' ruling that the effects alleged in the complaint did not "eliminate or materially diminish the existing competition of the distributors of other beers."

If the complaint had read the way petitioner now incorrectly quotes it, this criticism of the Court of Appeals might deserve consideration. But the complaint, in fact, does not allege either the existence of any competition between the parties, or the suppression of any competition, or any effect upon competition in the market, and the portion of the opinion of the Court of Appeals quoted by petitioner necessarily follows from the facts which were actually alleged, and which show that there was no effect on competition in commerce.

The complaint alleges that the petitioner's parent corporation was formerly the distributor in Mahoning and Trumbull Counties, Ohio (the Youngstown area), of Stroh Beer under an agreement with the respondent, Stroh Brewery Company (Stroh) (Complaint, Par. 8; Tr. 6a, 7a). Petitioner's parent corporation in 1958 created petitioner, Ace Beer Distributors, Inc. (Ace), as a separate company to be the exclusive Stroh distributor in those counties, and Ace acquired from its parent corporation the parent's rights under the distributorship agreement (Complaint, Par. 8; Tr. 7a). Stroh was the only company for which Ace acted as a distributor. Stroh was Ace's sole source and supply of merchandise for distribution and sale (Complaint, Par. 11; Tr. 7a).

Stroh thereafter cancelled its distributorship agreement with Act; as Ace concedes in its petition that Stroh had a right to do (Petition, pages 11, 12). Stroh substi-

tuted as its distributor in Mahoning and Trumbull Counties the respondent, Kohn, Inc. (Kohn), a company which was newly organized for that purpose by the respondents, Adam J. Kohn, Pauline Kohn and Kohn Beverage Co. (Complaint, Par. 14(b); Tr. 8a).

The respondent, Stephen Zarich, a "key employee" of Ace (Complaint, Par. 14d; Tr. 9a) left Ace's employ and became employed by Kohn (Complaint, Par. 14e; Tr. 10a). His brother, the respondent Peter Zarich, had been employed as a route supervisor by Ace's parent corporation which is not a party to this action (Complaint, Par. 14d; Tr. 9a). Peter Zarich left the employ of that company and also became employed by Kohn. All but two of Ace's drivers and salesmen also left Ace and were employed by Kohn (Complaint, Par. 14e; Tr. 10a). In the then existing state of the Youngstown labor market it was not possible to hire other employees with comparable training and experience (Complaint, Par. 14e; Tr. 10a).

The complaint also asserts that sometime after Stephen Zarich had left Ace's employ he returned and took certain records from Ace's office (Complaint, Par. 16; Tr. 10a).

The complaint alleges that these acts were done pursuant to an agreement or conspiracy among the respondents. From these ultimate facts, pleaded in great detail, Ace concludes that the alleged conspiracy was "to eliminate plaintiff as a beer distributor in interstate commerce and thereby to suppress prospective competition in commerce with the said Kohn, Inc. in the sale of Stroh's beer" (Complaint, Par. 13; Tr. 8a).

The complaint does not allege that Kohn and Ace ever competed in the market and, on the contrary, shows that Ace was created by its parent solely to distribute Stroh products and that it was the exclusive distributor of Stroh

products until the cancellation of its distributorship agreement and the substitution of Kohn, newly created for that purpose, as distributor. The alleged conspiracy could have no effect on competition existing in the Youngstown beer market, and no such effect is alleged.

There is no allegation that the alleged conspiracy had as its purpose or result any monopolization or price fixing or other market control. Similarly, there is no allegation of any group boycott or any use of market power. In short, the complaint alleges nothing but the substitution of one distributor for another, with no effects upon competition in the market, but accompanied by allegedly tortious acts against the former distributor.

In granting the respondents' motion for judgment on the pleadings, the District Court specifically held that "under the pleadings there can be *no conspiracy in restraint of trade* within the meaning of the Act." He further said that he could find in the events narrated in the complaint no "lessening of competition" and no "restraint of trade" (Memorandum Opinion, Tr. 32a, 33a).

In affirming, the Court of Appeals also concluded that the allegations of the complaint did not constitute any "restraint of trade" within the meaning of the Sherman Act. That court stated in part:

> "The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.
>
> "The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter. There is no allegation or con-

tention that the beer of other breweries was not just as available in that area after the change in distributors as it was before. See: *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377.

*"Unless it can be said that the refusal to deal with plaintiff had the result of suppressing competition and thus constituted 'restraint of trade' within the meaning of Section 1 of the Sherman Act, there is no violation of the Act. We do not think that the substitution by Stroh Brewery Company of one distributor for another had this result.**

"It is well settled that the 'restraint of trade' referred to in Section 1 of the Act, means only unreasonable restraint of trade, in that, as the cases point out, every commercial contract has some restraining effect upon trade. *Standard Oil Co. v. United States*, 221 U. S. 1, 51; *United States v. American Tobacco Co.*, 221 U. S. 106, 179-180; *Chicago Board of Trade v. United States*, 246 U. S. 231, 238-239. The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade." (Petition, pp. 32, 33.)

The petitioner has attempted to create an issue which has nothing to do with this case by asserting in its Statement of the Case and Argument that "public injury" was somehow involved in the decision below. At page 14 of its petition petitioner claims that the Court of Appeals insisted "upon allegations and proof of 'public injury' as a prerequisite to a finding that Stroh's wrongfully exercised its right of cancellation." Despite the quotation marks which petitioner placed around the words "public injury," those words are petitioner's and not the Court of

* Emphasis supplied throughout.

Appeals'. The Court of Appeals did not in any way base its decision upon "public injury," nor did it even mention that subject. Its decision was based upon the quite different ground that the allegations of the complaint did not set forth *any* restraint of trade or *any* unreasonable restraint of trade within the meaning of the Sherman Act. And contrary to petitioner's assertion (Petition, page 6, lines 2-7) a requirement that a restraint be unreasonable is not the same thing at all as a requirement of "public injury." Petitioner is mistaken if by this it is suggesting that this Court has *sub silentio* abolished the "rule of reason."

ARGUMENT.

A. The Decision of the Court Below Is Not in Conflict With Any Decisions of This Court.

The only cases cited by petitioner alleging facts comparable to those alleged in petitioner's complaint are common law tort cases where only simple damages or injunctive relief were sought. *Morgan's Home Equipment Corp. v. Martucci*, 390 Pa. 618, 136 Atl. 2d 838 (1957); *Bausch & Lomb Optical Co. v. Wahlgren*, 1 F. Supp. 799 (N. D. Ill., 1932); *International Tailoring Co. v. Lucas*, 64 N. Y. S. 2d 879 (1946); *A. S. Rampell v. Hyster*, 3 N. Y. 2d 369, 144 N. E. 2d 371 (1957).

The Sherman Act decisions upon which petitioner relies all differ from the present case in that in each of them there was alleged either the unlawful use of market power, or there was alleged a conspiracy to achieve one of those market effects, such as a change in the competitive state of the market, the acquisition of monopolistic power, or control of prices, quantities or territories, which constitute an unreasonable restraint of the trade in the marketing of goods within the meaning of the Sherman Act. Such addi-

tional factors are what make the difference between an ordinary common law tort case and a Sherman Act case.

No such additional factor is alleged in the present case, and petitioner's complaint does not state a cause of action for anything more than simple tort. The decision of the court below that petitioner had not stated a claim under the Sherman Act did not involve the application of any new or novel principles of law, and is not in conflict with any decisions of this Court or of the Courts of Appeals for other circuits.

Typical of the cases alleging an improper use of market power are the group boycott cases. Such boycotts have consistently been held to be unlawful under the Sherman Act. Since no group boycott is alleged in the present case, those decisions have no application here.

Binderup v. Pathe Exchange, 263 U. S. 291 (1923), alleged a group boycott of a motion picture exhibitor by distributors who controlled the distribution of all films in the United States. That this was the basis for the decision in *Binderup* was made clear by the two sentences from that decision immediately following the sentence from which petitioner has quoted on page 12 of the petition. In those sentences this Court stated:

> "It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act; but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all, to prevent any of them from dealing with the exhibitor."

Loewe v. Lawlor, 208 U. S. 274 (1908), involved a similar group action. Mr. Justice Stone, speaking for the

Court in *Apex Hosiery Company v. Leader*, 310 U. S. 469 (1940), described the allegations of the *Loewe* case as follows:

> "The restraint alleged was not a strike or refusal to work in the complainants' plant, but a secondary boycott by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the complainants, and to purchase the competing products of other unionized manufacturers. This Court pointed out that the restraint was precisely like that in Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U. S. 600, 610, 614, 58 L. ed. 1490, 1498, 1500, 34 S. Ct. 951, LRA 1915A 788, in which a conspiracy to circulate a 'black list,' intended to persuade retailers not to deal with specified wholesalers, was held to violate the Act because of its restraint upon competition with unlisted wholesalers." (310 U. S. at 505.)

Another group boycott was the basis for the decision in *Klor's v. Broadway Hale Stores*, 359 U. S. 207 (1959). Again, in *Radiant Burners, Inc. v. Peoples' Gas, Light & Coke Co.*, 364 U. S. 656 (1961), the allegations were of a group boycott by gas suppliers as well as a horizontal conspiracy by a group of stove manufacturers to regulate the Chicago stove market so as to prevent Radiant Burners from selling its stoves in that market.

In each of the group boycott cases the alleged restraint not only involved the improper use of market power but also had a restraining effect upon the competitive state of the market. Indeed, "this Court has never applied the Sherman Act in any case * * * unless the Court was of opinion that there was some form of restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Company v. Leader*, 310 U. S. 469, 495

(1940). The substitution of Kohn for Ace did not place any restraint upon commercial competition in the marketing of beer in the Youngstown area.

In all of the other Sherman Act cases cited by Ace such an effect upon the market was alleged. For instance, in *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962), there was alleged a conspiracy which had as its objectives both monopolization of the UHF television market in Milwaukee and the destruction of the UHF telecasting industry throughout the nation. A majority of the members of this Court were of the opinion that there existed a genuine issue of fact as to the truth of such allegations. By contrast, Ace has not alleged in the present petition any intention of monopolizing or of reducing the number of beer distributing businesses in Youngstown, or any intention to destroy the beer distributing business either in Youngstown or throughout the nation.

In several of the cases cited by petitioner the purpose of the alleged conspiracy was to monopolize a market, e.g., *Radovich v. National Football League*, 352 U. S. 445 (1957), where the defendants were alleged to have conspired "to monopolize and control organized professional football in the United States," *id.* at 447; and *Lorain Journal Co. v. United States*, 342 U. S. 143 (1951), in which this Court found that the defendant's conduct constituted an attempt to monopolize a segment of interstate commerce.

Other types of attempts to control a market and to restrain commercial competition in the marketing of goods have been struck down in other decisions cited by petitioner. In *Northern Pacific Ry. Co. v. United States*, 356 U. S. 1 (1958), this Court held unlawful contractual "preferential routing clauses" which were actually tying arrangements, where they were coupled with "sufficient

economic power to impose an appreciable restraint on free competition in the tied product," *id.* at 11.

Times-Picayune Publishing Co. v. United States, 345 U. S. 594 (1953), was, in part, an attempt to assert the existence of an unlawful tying agreement, which this Court found not to exist because there was no "dominant 'tying' product resulting in economic harm to competition in the 'tied' market," *id.* at 614 and, in part, an unsuccessful attempt to prove that the defendant had used a monopoly power to destroy its competition or to build another monopoly. Unlike *Times-Picayune*, Ace's petition in the present case does not allege either the use of monopoly power or any intent to change the competitive state of the market.

In *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947), there were alleged two conspiracies, one conspiracy being by nearly all the Chicago taxicab companies to bring such companies "under common control and to eliminate competition among them relative to contracts for supply transportation" between railroad stations, *id.* at 229, and the other conspiracy being by a cab manufacturer and a number of cab operators to exclude all other cab manufacturers from the market represented by the defendant cab operating companies. Cf. *Flintkote Company v. Lysfjord*, 246 F. 2d 368 (9th Cir., 1957), in which Flintkote was alleged to have joined in a horizontal conspiracy among tile contractors by which they had agreed to refrain from competition, to maintain noncompetitive prices, to allocate sales and to use group boycotts in order to exclude competitors.

White Motor Company v. United States, 372 U. S. 253 (1963), involved a different type of restraint upon competition in the market, a vertical arrangement by a manu-

facturer restricting the territory and customers of his distributors and dealers. A trial was ordered to determine the actual impact of these arrangements on competition. Ace's petition alleges nothing remotely similar to the contractual agreements by the White Motor Company's dealers and distributors not to compete.

Price fixing, by its very nature, is necessarily destructive of a free competitive market. Accordingly, price fixing, both vertical (*United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960); *A. C. Becken Co. v. Gemex Corp.*, 272 F. 2d 1 (7th Cir. 1959), *cert. den.* 363 U. S. 962 (1960)) and horizontal (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940)) has consistently been held to be in violation of the Sherman Act. No price fixing or price effect is alleged by Ace, and those cases, although relied upon by Act in its petition, have no relevance here.

In all of the above cases, *which include all of the Sherman Act cases decided by this Court cited by petitioner*, there was alleged an intent to affect the competitive state of the market, either by a direct lessening of competition in the market, or by the acquisition of improper market power and the creation of restrictive market conditions.

Such of those cases as dealt with conspiracies to decrease competition existing within a market are not relevant because the substitution of the newly created Kohn Company to replace Ace, a company with which it never competed, could have no effect upon competition existing in the market. And each of the other cases, which dealt with conspiracies to acquire improper market power and to create restrictive market conditions, are not relevant, because Ace has not alleged that there was any change in market conditions or any acquisition of monopoly or other improper power.

It seems to be petitioner's position that a Sherman Act violation is stated any time that there is alleged "destruction of the trader's business capability by conspiracy." (Petition, p. 11.) In other words, petitioner would expand the coverage of Section 1 of the Sherman Act to include common law torts against business entities, even in the absence of any effect upon competition in the market or any other effect upon market conditions. No court has ever interpreted the Sherman Act as meaning what petitioner now says it means.

B. The Decision of the Court Below Is Not in Conflict With Decisions of Other Courts of Appeals.

The decisions of the Court of Appeals for the 1st, 2nd and 9th Circuits upon which petitioner relies in pages 19-24 of its petition are entirely consistent with the decision of the court below in the instant case. In each of those cases there was alleged to exist a conspiracy designed to lessen the competition existing in the market.

In *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp.*, 41 F. 2d 148 (1st Cir., 1930), 57 F. 2d 96 (1st Cir., 1932) the defendant was plaintiff's largest competitor, and a conspiracy was shown, "the intent and purpose of which, if carried out, would eliminate the largest competitor of one of the conspirators in a particular section of the country * * *" 57 F. 2d at 102.

Similarly, in *Atlantic Heel Co. v. Allied Heel Co.*, 284 F. 2d 879 (1st Cir., 1960) the parties were actual competitors within a market and the purpose of the alleged conspiracy was to lessen competition within the market by preventing plaintiff from continuing to compete. The court held that a cause of action was stated. Judge Hartigan, who wrote the opinion, indicated that he was following

Albert Pick-Barth, but a majority of the court in a concurring opinion by Judge Woodbury, refused to endorse *Albert Pick-Barth*, stating that that case "was unique on its facts in 1932 and so far as we can determine it stands alone today."

Syracuse Broadcasting Corp. v. Newhouse, 236 F. 2d 522 (2nd Cir., 1956) involved a radio station and a newspaper in Syracuse which were alleged to be in competition for the advertising business in the market. The plaintiff claimed that the defendants had conspired "for the alleged purpose of putting plaintiff out of business and removing it from the scene as a competitor" 236 F. 2d at 526.

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F. 2d 1 (9th Cir., 1960), *modified* 289 F. 2d 933 (9th Cir., 1961), *reversed*, 370 U. S. 19 (1962) dealt with allegations of attempted monopolization and of a conspiracy among three of plaintiff's competitors and a supplier intended to change the competitive state of the market by eliminating the competition of the plaintiff. Indeed, in the portion of the charge to the jury quoted by the petitioner, the court requiring a finding of liability only in the event that the jury found that the conspiracy was "to eliminate the competition of the plaintiff." (Petition, p. 23.)

But the conspiracy set forth in Ace's complaint is not alleged to have lessened competition existing in the market, nor to have had any effect upon the competitive state of the market. It involved nothing but the substitution of a newly created Stroh distributor for the former Stroh distributor in an otherwise unaffected market.

C. The Commission of a Business Tort in Conection With a Refusal to Deal Does Not Entitle the Injured Party to Treble Damages Under the Sherman Act.

The basic theory upon which petitioner relies in asserting that its complaint sets forth a Sherman Act violation appears on pages 16-18 of its petition where petitioner claims that a change in distributors, when associated with "tortious conduct constituting unfair competition or unfair trade practices at common law" (Petition, p. 18) is a violation of Section 1 of the Sherman Act even where there is no effect upon competition in the market. There is no support for this argument by petitioner, and the courts below properly rejected it.

This novel theory is apparently based upon a misunderstanding of an article by Professor Oppenheim in *Selected Antitrust Developments*, 15 A. B. A. Section on Antitrust Law, 37 (1959). At page 43 Professor Oppenheim set forth what he called "the basic principle that a seller, acting unilaterally, has the discretion to select the persons with whom he will deal or continue to deal." The Professor then explained the limitations which exist with respect to this discretion and set forth the circumstances under which the would-be purchaser will be provided a remedy by some law, *but not necessarily by the Sherman and Clayton Acts*. He was listing *all* of the remedies, under *all* laws, which may be available under various circumstances. He said:

> "The over-all limitation is misuse or abuse of this discretion when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to deal.
>
> "These plus elements include among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade

> practices at common law; (2) violation of a civil rights statute or other type of constitutionally valid statute limiting refusals to deal; and (3) conduct otherwise in violation of the Sherman Act, the Clayton Act, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute." (pp. 43-44.)

By this, Professor Oppenheim meant only that *some* legal remedy exists whenever the "plus elements" are found. He did not mean that there is a remedy in each case under the Sherman and Clayton Acts.

For instance, as an example of his second category, violation of a statute limiting refusal to deal, he listed in footnote 28 the Automobile Dealer Franchise Act of 1956, 15 U. S. C. § 1221-1225. But a refusal to deal in violation of that act does not create a cause of action for treble damages under the Sherman and Clayton Acts. Instead, the Franchise Act provides (15 U. S. C. § 1222) for actual damages only.

In his third category of "plus elements" Professor Oppenheim includes violations of "Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute." But a violation of § 5 of the Federal Trade Commission Act (15 U. S. C. § 45) is *not* a violation of the antitrust acts as defined by Congress (15 U. S. C. § 12) and does not entitle the injured party to a treble damage action under the Clayton Act (15 U. S. C. § 15). And it is hardly necessary to point out that a violation of a state antitrust statute is not automatically a violation of the Sherman Act.

Similarly, when there is present Professor Oppenheim's first "plus element," "tortious conduct constituting unfair competition or unfair trade practices at common law" an injured party's only remedy is for ordinary damages at common law unless there is *in addition* a separate

and further intent or natural consequence of causing one of those market effects which constitute an unreasonable restraint of trade under the Sherman Act. And Ace's complaint shows that no such intent or consequence was present here.

Petitioner also argues that *Times-Picayune Publishing Co. v. United States*, 345 U. S. 594 (1953) and *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962) stand for the proposition that an individual refusal to deal is a Sherman Act violation if accompanied by *any* "unlawful conduct or agreement." But, quite plainly, the "unlawful conduct or agreement" which this Court referred to in those cases was conduct or agreement which would itself be unlawful *under the Sherman Act*. That this was the meaning of the Court was made plain by Mr. Justice Clark in *Poller* when he stated that CBS's argument erroneously assumed that CBS had an absolute right "*despite violations of the antitrust laws*" to exercise its contractual privilege, 368 U. S. at 473. And, as Mr. Justice Harlan pointed out in his dissent, the Court's opinion recognized that CBS's purchase of a TV station in Milwaukee and cancellation of Poller's station affiliation "would be unlawful only if conceived in a purpose to unreasonably restrain trade, control a market, or monopolize." 368 U. S. at 478. In the instant case, where there is not alleged to have been any such purpose or agreement, the mere addition of allegedly tortious conduct to a refusal to deal does not create a Sherman Act violation.

In *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *aff'd. on op. below*, 239 F. 2d 176 (4th Cir. 1956), *cert. den.* 355 U. S. 823 (1957), an automobile dealer brought an action against its former supplier (Hudson) and another dealer (Bankert) alleging a refusal to deal, coupled with "facts which would

support claims against Hudson for breach of contract and which might support claims against Bankert for tortious interference with contract rights." 138 F. Supp. at 902. In holding that this complaint did not state a cause of action under the Sherman Act, the Court said in part:

> "The general principles which control these cases have been frequently stated, and may be briefly summarized. Every manufacturer has a natural and complete monopoly of his particular product, especially when sold under his own private brand or trade name. * * * If he is engaged in a private business, he is free to exploit this monopoly by selling his product directly to the ultimate consumer or through one or more distributors or dealers, as he many deem most profitable to him. If he chooses the latter method, he may exercise his own independent discretion as to the parties with whom he will deal. This is a common law right which the antitrust laws have not destroyed. * * * *A refusal to deal becomes illegal only when it produces an unreasonable restraint of trade or a monopoly forbidden by the anti-trust laws.* * * *
>
> * * *
>
> "No horizontal conspiracy between competitors, no effort to extend the manufacturer's natural monopoly of its own product, no effort to establish market dominance and drive out the products of competitors is alleged.
>
> * * *
>
> "Of course the agreement would be invalid if it was the result of some horizontal arrangement between competitors, or if there was any agreement which tended unreasonably to restrain interstate commerce or to create a monopoly. But a monopoly in that sense would have to be a real monopoly in the commodity and not the natural monopoly which a manufacturer has in his own product. Unless the manufacturer dominates the market, he has a right to

give a dealer an actual monopoly, let alone a 'virtual' monopoly, in the sale of his particular make or brand in a particular territory.

"And this right is not to be lost simply because the manufacturer and the dealers discuss the matter before the expiring agency or dealership agreements terminate and are not renewed." (138 F. Supp. at 905-907.).

In *Apex Hosiery Co. v. Leader*, 310 U. S. 469 (1940) this Court established the principle that the standard for determining the legality of conduct under the antitrust laws must be found in those laws and not elsewhere. There it was contended that the defendants had violated the Sherman Act by conspiring to stop the operation of the plaintiff's factory by a sit-down strike and that they had carried out the conspiracy by means of a series of tortious, and at times violent, actions. This Court, recognizing that the conspiracy was intended to restrain the movement of goods in interstate commerce and that various torts had been committed against plaintiff's business, held that nevertheless this was not the kind of restraint of commerce which the Sherman Act was designed to prohibit.

"But the Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation. * * * It is not seriously contended here that a conspiracy to derail and rob an interstate train, even though it were laden with 100,000 dozen pairs of stockings, necessarily would involve a violation of the Sherman Act." (310 U. S. at 486-487.)

* * *

"* * * The legislative history of the Sherman Act, as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and property. * * * It was another and quite a different evil at

which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." (310 U. S. at 490-493.)

* * *

"* * * The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence." (310 U. S. at 513.)

The *Apex* case was cited with approval by Mr. Justice Black in his opinion in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961). The Court of Appeals in the *Noerr* case had affirmed a judgment that group solicitation by certain railroads of legislation and law enforcement injurious to their competitors in the trucking industry violated the Sherman Act. 273 F. 2d 218 (3rd Cir., 1959). The Third Circuit's affirmance was based upon the fact that the record showed "both legal and illegal methods to obtain the illegal objective of injuring and/or destroying the long-haul trucking industry." (273 F. 2d 220.)

This Court reversed. It held that the Sherman Act did not apply. The Court said that although the defendants' conduct—

> "could perhaps, through a process of expansive construction, be brought within the general proscription of 'combination(s) * * * in restraint of trade,' they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements." (365 U. S. at 136.)

The same principles were applied in *Parmelee Transportation Co. v. Keeshin*, 292 F. 2d 794 (7th Cir., 1961), *cert. den.*, 368 U. S. 944 (1961), *rehearing den.* 368 U. S. 972 (1962). In that case the defendant railroads were alleged to have conspired among themselves and with Mr. Cross, an Interstate Commerce Commissioner, to destroy the plaintiff's business of transferring passengers and baggage among the various Chicago railroad stations. The purpose of the alleged conspiracy was to give the transfer business to a new company with which Mr. Cross was associated. That new company was to be substituted for Parmelee as the recipient of the railroads' transfer business. The alleged conspiracy included tortious and criminally illegal activities, in that the railroads' substitution of the new company to handle the transfer work was made in order to influence Commissioner Cross to give favorable consideration to important railroad matters pending before the Interstate Commerce Commission. The District Court held that these actions, although wrong under

other law, were not a violation of the Sherman Act, and the 7th Circuit affirmed, stating:

> "Assuming the record presented as to his (Cross') involvement reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country. However, the use of conventional antitrust language in drafting a complaint will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law. We are not concerned with labels. Otherwise, an adroit antitrust lawyer might use his skill in the use of words to convert many unlawful acts into antitrust violations. The antitrust laws were never meant to be a panacea for all wrongs." (292 F. 2d at 804.)

As this Court stated of the Sherman Act in *Hunt v. Crumboch*, 325 U. S. 821 (1945):

> "That Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." (325 U. S. at 826.)

The allegations made by Ace constitute, at most, a charge that a tort was committed. The Sherman Act was not designed to supersede the law of torts and to authorize any business to invoke Federal jurisdiction and seek Clayton Act remedies whenever it suffers a tort, unless the acts were done in order to bring about market effects constituting unreasonable restraint of trade in interstate commerce within the meaning of the Sherman Act. No such unreasonable restraint of trade is alleged here. The courts below properly held that the petition did not state a claim under the Sherman Act.

CONCLUSION.

The decision below is not in conflict with any decisions of this Court or of other Courts of Appeal. The case was decided in conformity with long established doctrines. There are no special or important reasons for review by this Court. We respectfully ask that the petition be denied.

Respectfully submitted,

C. KENNETH CLARK,
1200 Mahoning Bank Bldg.,
Youngstown 3, Ohio,
Attorney for Respondents,
Kohn, Inc., The Kohn Beverage Co., Pauline Kohn, Adam J. Kohn, Stephen Zarich and Peter Zarich.

Of Counsel:

C. KENNETH CLARK, JR. and
HARRINGTON, HUXLEY & SMITH.